IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 97-3090
v.	:	
	:	CRIMINAL ACTION
JAMES L. GOULD	:	NO. 91-580

MEMORANDUM AND ORDER

Yohn, J. July , 1997

Defendant has brought this motion pursuant to 28 U.S.C. § 2255 to set aside or vacate his sentence, arguing that his trial counsel was constitutionally ineffective for failing to object to the court's imposition of the statutory maximum sentence. Gould essentially argues that, despite the fact that the statutory maximum sentence was within the defendant's properly calculated guideline range, the court's imposition of that sentence illegally negated the effect of the defendant's two-point reduction for acceptance of responsibility. Finding this argument lacks merit, the court concludes that trial counsel was not ineffective for failing to raise the issue. The court will, therefore, deny the motion.

BACKGROUND

On November 26, 1991, defendant James L. Gould ("Gould") pled guilty to one count of armed bank robbery. See 18 U.S.C. §§ 2113(a), 2113(d). Defendant's guilty plea in the instant action was the result of another in a series of criminal escapades spanning three decades. As a result of Gould's lengthy criminal

history, the Presentence Report ("PSR") fixed Gould's total criminal history points at 27. See PSR at ¶ 49. Twenty-seven points was more than adequate to qualify Gould for the maximum criminal history category of VI. See PSR at ¶ 49-50. As two of his prior felonies were crimes of violence, Gould was also classified as a career offender pursuant to U.S.S.G. § 4B1.1, thereby raising the offense level of his crime to 34. See U.S.S.G. § 4B1.1(B); PSR at ¶ 51. Two points were then subtracted from this offense level for acceptance of responsibility, see U.S.S.G. § 3E1.1; U.S.S.G. § 4B1.1, to yield a final offense level of 32 and a Criminal History Category of VI, resulting in a sentencing range of 210 to 262 months imprisonment. See PSR at ¶ 55.

Arguing that the defendant's criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct, the Government filed a motion pursuant to U.S.S.G. § 4A1.3 seeking an upward departure in the defendant's sentencing range. The court found adequate grounds for an upward departure and granted the government's motion.[1] See N.T. Oct. 8, 1992 at 49-51. Because the defendant already had a Criminal History Category of VI, the guidelines instruct the court to adjust the offense level within category VI. See U.S.S.G. § 4A1.3 ("Where the court determines that the extent and nature of

[1] Defendant does not appear to contest the court's upward departure pursuant to § 4A1.3. Rather, he argues that the court's upward departure was limited by the application of § 3E1.1.

the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case."). Following these instructions, the court adjusted the defendant's offense level to 34, yielding a guideline range of 262 to 327 months in prison. See N.T. Oct. 8, 1992 at 51.

The statutory maximum sentence for armed bank robbery is 25 years, or 300 months. See 18 U.S.C. § 2113(d). Because the statutory maximum was within the adjusted guideline range, and because the court found no reason to depart downward from the guideline range, the court imposed the statutory maximum sentence of 300 months imprisonment. See N.T. Oct. 8, 1992 at 51-53; U.S.S.G. § 5G1.1(c)(1).

Gould now argues that the court was not authorized to impose the statutory maximum sentence in his case, because to do so eviscerates the benefit of his acceptance of responsibility. Essentially, Gould argues that, because he accepted responsibility and qualifies for a reduction under U.S.S.G. § 3E1.1, the court may not impose the maximum sentence authorized by law, but must rather depart downward from that maximum sentence based on his acceptance of responsibility. To do otherwise, he claims, would violate the language and purpose of the sentencing guideline's acceptance of responsibility

provision.

Defendant attempted to raise this issue on direct appeal, but the court of appeals found that the issue had been waived because trial counsel had not raised it at sentencing. Accordingly, Gould now claims that trial counsel was constitutionally ineffective for failing to raise the issue.

DISCUSSION

I. Subject Matter Jurisdiction

Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 provides, in part, as follows:

> A 1-year period of limitations shall apply to a motion under this section [§ 2255]. The limitations period shall run from the latest of--
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> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
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> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220 (codified at 28 U.S.C. § 2255).

The statute thus provides a one year limitation period in which claims under § 2255 must be brought. As defendant's

conviction became final well before the enactment of AEDPA, at the latest the limitations period began to run in Gould's case on the date the AEDPA became effective, April 23, 1996. See, e.g., Calderon v. United States Dist. Ct., 112 F.3d 386, 389 (9th Cir. 1997) ("No petition filed on or before April 23, 1997--one year from the date of AEDPA's enactment--may be dismissed for failure to comply with the . . . time limit."); Duarte v. Hershberger, 947 F. Supp. 146, 149 (D.N.J. 1996) (granting defendants a one-year grace period to file petitions after enactment of AEDPA). Gould's motion pursuant to § 2255 was filed on April 29, 1997--six days after the limitation period expired.

In a letter to the court, Gould explained that his motion would be filed late because his prison was subject to a "lock down" and he would be unable to complete the motion before the expiration of the limitation period. The government investigated Gould's claim and confirmed that Gould's prison was subject to a lockdown. The government further stated that "[i]n the interest of justice, the government will not pursue any waiver claim it may have in this matter based on the extension requested by the defendant." Gov't's Answer to Def.'s Mot. Under 28 U.S.C. § 2255 at 1 n.1. It therefore appears to the court that the government has waived the applicability of the limitations period in this case.

Subject matter jurisdiction, however, may not be waived, and such jurisdiction may not be conferred even by the consent of the parties. See Reich v. Local 30, Int'l Brotherhood of Teamsters,

6 F.3d 978, 982 n.5 (3d Cir. 1993). The federal courts have an independent obligation to satisfy themselves of their subject matter jurisdiction to hear a given dispute. See Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1049 (3d Cir.) ("It is axiomatic that federal courts are courts of limited jurisdiction, and as such are under a continuing duty to satisfy themselves of their subject matter jurisdiction before proceeding to the merits of any case."), cert. denied sub nom., Upp v. Mellon Bank, N.A., 510 U.S. 964 (1993). The court must therefore decide whether the limitation period in § 2255 is jurisdictional--if that provision deprives this court of subject matter jurisdiction, the government may not waive the defendant's failure to comply with the provision.

As of this writing, only one court has squarely addressed the question of whether the limitation provision in § 2255 is a statute of limitation subject to tolling and waiver or a limitation on the court's subject matter jurisdiction. In Calderon v. United States Dist. Ct., 112 F.3d 386 (9th Cir. 1997), the Court of Appeals for the Ninth Circuit concluded that the limitation period in AEDPA with respect to § 2254 petitions is non-jurisdictional:

> Unlike other parts of AEDPA, [the limitation provision] is remarkably lucid. It is phrased only as a "period of limitation," and "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 . . . (1982). Nor does the jurisdictional provision of the habeas statute, 28 U.S.C. § 2241, "limit jurisdiction to those cases in which there has been a timely filing" in the district

> court. Zipes, 455 U.S. at 393 . . . . Indeed, both the Supreme Court and this court have repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitation . . . .

Calderon, 112 F.3d at 390.

Calderon's reasoning is persuasive. Nothing in the language of the statute suggests that the limitation period in § 2255 is jurisdictional rather than a statute of limitation. Indeed, the fact that the statute contains its own version of a "discovery rule" in paragraph 4, and a provision similar to the common law rule of fraudulent concealment in paragraph 2, suggests that the drafters envisioned the provision to function as a typical statute of limitations, rather than a jurisdictional limitation. Further, because the limitations periods operates to remove judicial review of constitutional claims, the court will construe the statute in favor of judicial review if possible. See Webster v. Doe, 486 U.S. 592, 603 (1988); see Stehney v. Perry, 101 F.3d 925, 934 (3d Cir. 1996).

Absent contrary authority from our court of appeals, the court adopts the reasoning of Calderon and concludes that the limitations period in AEDPA is a statute of limitations subject to tolling and waiver. Because the government has waived the statute of limitations defense, the court will proceed to evaluating the merits of the defendant's motion.

II. Gould's Contentions Are Meritless

A. Standard of Review Under 28 U.S.C. § 2255

28 U.S.C. § 2255[2] provides federal prisoners with a statutory remedy for challenging the lawfulness of their convictions. See United States v. Addonizio, 442 U.S. 178, 184 (1979). But "[s]ection 2255 does not afford a remedy for all errors that may be made at trial or sentencing. . . . The alleged error must raise 'a fundamental defect which inherently results in a complete miscarriage of justice.'" United States v. Essig, 10 F.3d 968, 977 n.25 (3d Cir. 1993) (quoting Addonizio, 422 U.S. at 185). Rule 4(b) of the rules governing § 2255 proceedings requires the court to consider the motion together with all the files, records, transcripts and correspondence relating to the judgment under attack. See 28 U.S.C.A. § 2255 Rule 4(b). While the final disposition of a § 2255 motion lies within the discretion of the trial judge, Government of Virgin Islands v. Nicholas, 759 F.2d 1073, 1075 (3d Cir. 1985), "the discretion of the district court summarily to dismiss a motion brought under § 2255 is limited to cases where the motion, files,

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[2] Section 2255 states in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

and records '"show conclusively that the movant is not entitled to relief."'" United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (quoting United States v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992) and Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)).

Our court of appeals has emphasized that a § 2255 proceeding should not be a substitute for direct appeal. See Essig, 10 F.3d at 979 ("[Section] 2255 is no longer a necessary stand-in for the direct appeal of a sentencing error because full review of sentencing errors is now available on direct appeal."). Thus, a defendant who fails to raise an issue on direct appeal and subsequently attempts to raise the issue in a § 2255 proceeding must generally demonstrate cause and prejudice for his failure to raise the claim in his direct appeal. See id. A defendant need not, however, demonstrate cause and prejudice when he raises a claim of ineffective assistance of counsel. See United States v. DeRewal, 10 F.3d 100, 104 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994). Indeed, a § 2255 motion is the proper and preferred vehicle for challenging ineffective assistance of counsel. See Nahodil, 36 F.3d at 326.

The cause of action for ineffective assistance of counsel is based on the Sixth Amendment right to counsel, which exists "in order to protect the fundamental right to a fair trial." Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993). The right to effective assistance of counsel extends to plea negotiations, see Hill v. Lockhart, 474 U.S. 52 (1985), and certain sentencing

proceedings, see Strickland v. Washington, 466 U.S. 668, 686 (1984) (extending right to counsel to capital sentencing proceedings). In order to make a showing of ineffective assistance of counsel, a habeas petitioner must make a two part showing. First he must show that his attorney's performance was objectively deficient and second he must prove that the deficient performance prejudiced the defense. See Strickland, 466 U.S. at 687.

Regarding "deficient performance," the court must defer to counsel's tactical decisions, not employ hindsight and give counsel the benefit of a strong presumption of reasonableness. See id. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential . . . ."); Government of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1431 (3d Cir.), cert. denied, 117 S. Ct. 538 (1996). While an attorney has a duty to investigate reasonable claims and defenses, see Strickland, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); Weatherwax, 77 F.3d at 1432, an attorney's performance cannot be deemed ineffective or deficient if she fails to raise a defense which is "doomed to failure." Sistrunk v. Vaughn, 96 F.3d 666, 671 (3d Cir. 1996).

A habeas petitioner alleging "prejudice" must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 113 S. Ct. at 842 (citing Strickland, 466 U.S. at 687). That the

outcome may have been different but for counsel's error is not dispositive of the "prejudice" inquiry; rather, the court must determine whether the result of the proceeding was fundamentally unfair or unreliable. See id. Obviously, a defendant cannot show that a proceeding was fundamentally unfair if the underlying claims the attorney failed to raise are meritless, because the outcome of the proceeding would not have been different. Because Gould's substantive claim is wholly without merit, he cannot show that he was prejudiced by his counsel's performance.

B. The Court Properly Applied the Sentencing Guidelines

Defendant argues, essentially, that by imposing the statutory maximum sentence, the court impermissibly negated any benefit of his two-point reduction for acceptance of responsibility in violation of the text and policy of the Sentencing Guidelines. To the contrary, the court followed the mandate of the guidelines and properly sentenced defendant to the statutory maximum sentence of 300 months.

"The intent of the Sentencing Commission is that the Guidelines be applied like a formula; a court or presentence investigator should go down each guideline in order, making the necessary calculations. . . . The application instructions . . . are to be followed in order." United States v. McDowell, 888 F.2d 285, 293 (3d Cir. 1989). The court applied the sentencing guideline's instructions in order, which yielded a sentence of

300 months.

Under the guideline's instructions, the court should first determine the defendant's base offense level and then make any upward adjustments to the base offense level. See U.S.S.G. § 1B1.1(a)-(d). After the base offense level is computed, the fifth step is to "[a]pply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three." U.S.S.G. § 1B1.1(e). After the court adjusts the base offense level for acceptance of responsibility, the next step under the guidelines is to "[d]etermine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments. " U.S.S.G. § 1B1.1(f). The very last step under the guideline's instructions is to "[r]efer . . . to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence." U.S.S.G. § 1B1.1(i).

The court applied these guidelines in order. Under a straightforward application of the guidelines, the court first determined the defendant's base offense level. Pursuant to § 1B1.1(f), the court then determined the defendant's Criminal History Category--VI. Under § 1B1.1(f), the next step was to turn to Part B of Chapter Four. Under § 4B1.1, the court determined the defendant was a career offender, subject to a 25 year sentence, applied § 4B1.1(B) to reach an offense level of 34, and reduced the defendant's offense level to 32 for

acceptance of responsibility. See U.S.S.G. § 4A1.3 (1991) ("If § 3E1.1 (Acceptance of Responsibility) applies, reduce by 2 levels.") The final step in the guidelines is to apply any policy statements that might warrant consideration in imposing sentence. See U.S.S.G. § 1B1.1(i). Section 4A1.3 is a policy statement which authorizes adjustment if the Criminal History Category does not adequately represent the defendant's criminal history. See U.S.S.G. § 4A1.3. The court determined that this provision should apply, and, because the defendant's Criminal History Category was already VI, applied the instructions in § 4A1.3 and increased the offense level by two points to more accurately reflect the defendant's criminal history. The sentence actually imposed, 300 months, was within the guideline range for a criminal history category of VI and an offense level of 34.

Defendant's argument in this case, however, is that by following the instructions provided by the guidelines, the court deprived him of the benefit of his acceptance of responsibility. The statutory maximum sentence fell within the guideline range applicable to defendant's offense level as adjusted under § 4A1.3. Although the court expressed that it would, if possible, have sentenced the defendant at the upper end of the adjusted guideline range, see N.T. Oct. 8, 1992 at 52 ("And . . . it appears to the Court that if it were not the statutory maximum that this Defendant has earned even a -- heavier sentence than that which I am about to -- impose on him."), the court was

confined by the statutory maximum sentence. See U.S.S.G. § 5G1.1(c)(1). Despite the fact that defendant received a lesser sentence than the court desired to impose, he claims that he was entitled to some benefit from his acceptance of responsibility, and the court was therefore unauthorized to sentence him to the longest term of imprisonment authorized by law.

Although the precise question of whether the court has the power to sentence a defendant to the statutory maximum if he has accepted responsibility for his crime appears to be one of first impression,[3] a similar claim has been rejected by two courts of appeal. In United States v. Caceda, 990 F.2d 707 (2d Cir.), cert. denied sub nom., Rojas-Holguin v. United States, 510 U.S. 918 (1983), the defendant argued "that the [district] court erred in adding an upward adjustment of 3 levels because the adjustment brought the level to 45, 2 levels above the highest offense level on the table, rendering his 2-level downward adjustment valueless." Id. at 709. The defendant argued that the court

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[3] An unpublished opinion by the Court of Appeals for the Ninth Circuit seems to have rejected a very similar argument. See United States v. Reynozo, 100 F.3d 965 (Table), 1996 WL 616620 (9th Cir. 1996). In that case, the court affirmed the district court's refusal to depart downward from the statutory maximum sentence based on the defendant's acceptance of responsibility. While the court stated that a court might have discretion to depart downward under Chapter 5 of the guidelines in such a circumstance, it made clear that there was no requirement to do so. See also United States v. Rodriquez, 64 F.3d 638 (11th Cir. 1995) (holding that where minimum guideline sentence is greater than statutory maximum, and court sentences defendant to statutory maximum under § 5G1.1(a), it may not depart downward under § 3E1.1 for acceptance of responsibility but may, in its discretion, depart downward under § 5G1.1 to give the defendant the benefit of his acceptance of responsibility).

must stop counting upward adjustments at the maximum level of 43 so that when the court reached the next step under the guidelines--reducing the offense level of acceptance of responsibility--that reduction would still benefit the defendant. Otherwise, the defendant had argued, he would be subject to a maximum score of 43, whether or not he had accepted responsibility.

The Second Circuit rejected the defendant's argument, stating that it was "evident that downward adjustments must be made from the total of the base offense level plus upward adjustments even if that total exceeds 43." Id. The United States Court of Appeals for the Eleventh Circuit, faced with the same issue, agreed with the Caceda court, focusing on the guideline's sequential instructions for determining sentences found at § 1B1.1. See United States v. Houser, 70 F.3d 87, 91 (1995), cert. denied, 116 S. Ct. 1440 (1996). Even though sequential application of those instructions may result in negating the effect of the defendant's acceptance of responsibility, the Houser court found that the district court properly applied the guidelines. See id. at 92 ("In our view, to do otherwise would be inconsistent with the instructions contained in the guidelines.").[4]

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[4] In Rodriguez, the court held that a defendant may be entitled to a reduction under Chapter Five from the statutory minimum sentence if he has accepted responsibility. See Rodriguez, 64 F.3d at 643. The court clearly expressed at sentencing that it would have sentenced the defendant to an even greater sentence if permitted to do so. See N.T. Oct. 8, 1992 at

In this case, the court correctly applied the guidelines by first reducing Gould's offense level for acceptance of responsibility and then adjusting the offense level pursuant to § 4A1.3. That the defendant received the maximum sentence allowed under law despite his acceptance of responsibility is a result of the sequential application of the guidelines as intended by the Sentencing Commission. See McDowell, 888 F.2d at 293. It is also a perfectly reasonable sentence based on the defendant's extensive criminal record. Because the court properly applied the guidelines, counsel could not have been ineffective for failing to object. The record clearly demonstrates that Gould is conclusively entitled to no relief and the court will, therefore, deny the motion without a hearing.

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52 ("And . . . it appears to the Court that if it were not the statutory maximum that this Defendant has earned even a -- heavier sentence than that which I am about to -- impose on him."). Thus, even assuming that the court was authorized to depart downward for acceptance of responsibility under Chapter Five, it would not have done so in this case.

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JAMES L. GOULD	:	NO. 91-580

ORDER

AND NOW, this day of July, 1997, after consideration of the defendant's motion pursuant to 28 U.S.C. § 2255 and the government's response thereto, IT IS HEREBY ORDERED that defendant's motion is DENIED.

The court finding that the defendant has failed to make a substantial showing of the denial of constitutional right, IT IS FURTHER ORDERD that a certificate of appealability will not be issued.

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William H. Yohn, Jr., Judge